IN THE

Supreme Court of the United States

No. 209 of 1953
CIVIL

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, *Respondents*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

vs.

ARCHIE C. STUDE, *Respondent*.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Petitioner*,

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RESPONDENTS' BRIEF RESISTING PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Chapter 471 of the Code of Iowa of 1950 entitled "EMINENT DOMAIN" relates exclusively to the right to condemn land in the State of Iowa. Among those granted that right of condemnation are railroads which have satisfied the conditions imposed by the sections of the statutes applicable thereto. (Code Iowa 1950, §§ 471.6-471.10, inclusive.) The specific sections applicable herein provide:

"471.6. *Railways.* Any railway, incorporated under the laws of the United States or of any state thereof, may acquire by condemnation or otherwise so much real estate as may be necessary for the location, construction, and convenient use of its railway. Such acquisition shall carry the right to use for the construction and repair of said railway and its appurtenances any earth, gravel, stone, timber, or other material, on or from the land so taken.

"471.9. *Additional purposes.* Any such corporation owning, operating, or constructing a railway may, by condemnation or otherwise, acquire lands for the following additional purposes:

* * * * *

"3. For additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or relocating portions of the line, and for excavations, embankments, or places for depositing waste earth.

* * * * *

"471.10. *Finding by commerce commission.* The company before instituting condemnation proceedings under section 471.9, shall apply in writing to the Iowa state commerce commission, for permission to so condemn. Said commission shall give notice to the landowner, and examine into the matter, and report by certificate to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have power to condemn the lands so certified by the commission."

By an entirely separate chapter the procedure for condemnation in Iowa to enforce in the state courts the substantive rights of condemnation granted by Chapter 471

is set out. This is Chapter 472 of the Iowa Code of 1950 entitled, "PROCEDURE UNDER POWER OF EMINENT DOMAIN." This procedural chapter of the Iowa Code is applicable not only to railroads seeking to condemn by state proceedings but also to other condemnors. Thus Code of Iowa 1950, § 472.1, provides:

> "The procedure for the condemnation of private property for works of internal improvement, and for other public uses and purposes, unless and except as otherwise provided by law, shall be in accordance with the provisions of this chapter."

The procedure to be followed in a condemnation case in the United States courts is prescribed by the Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A., and subdivision (k) of Rule 71A specifically provides that the rule governs in actions involving the exercise of the power of eminent domain under the law of a state and that if the state law provides for trial of any issue by jury or for trial of the issue of compensation by jury or commission, or both, that provision shall be followed.

Alleging that theretofore it had been authorized by the Interstate Commerce Commission and had been granted authority to condemn by the Iowa State Commerce Commission, the Chicago, Rock Island & Pacific Railroad Company (hereinafter referred to as petitioner) on January 18, 1952, instituted condemnation proceedings before the Sheriff of Pottawattamie County, Iowa, in accordance with the provisions of Chapter 472, Code of Iowa, 1950, and filed a written application for condemnation of the private property of various persons, including land owned by Archie C. Stude and leased by William Lumpkin, respondents herein (R. 5-7). The sheriff appointed six

resident freeholders of the county as a commission to assess and appraise damages (R-7) and a notice of hearing before the commissioners was served on the landowners (R. 7, 9). A hearing was had before the Commissioners and they made their awards, including an award to Archie C. Stude in the amount of Twenty-three Thousand Eight Hundred Eighty-eight and 60/100ths Dollars ($23,888.60) and an award to William Lumpkin in the amount of One Thousand and no/100ths Dollars ($1,000.00) (R. 7, 8).

The petitioner deposited the awards with the sheriff on February 23, 1952 (R. 18) and took possession of the land condemned under the procedure set forth in Section 472.25 of the Code of Iowa, 1950, which provides:

> "*Right to take possession of lands.* Upon the filing of the commissioners' report with the sheriff, the applicant may deposit with the sheriff the amount assessed in favor of a claimant, and thereupon the applicant shall, except as otherwise provided, have the right to take possession of the land condemned and proceed with the improvement. No appeal from said assessment shall affect such right, except as otherwise provided."

Under Iowa procedure, Chapter 472, Code of Iowa, 1950, the following sections provide that the award is final unless an appeal is taken:

> "Section 472.17. When appraisement final. The appraisement of damages returned by the commissioners shall be final unless appealed from.
>
> "Section 472.18. Appeal. Any party interested may, within thirty days after the assessment is made, appeal therefrom to the district court, by giving the

adverse party, his agent or attorney, and the sheriff, written notice that such appeal has been taken."

On March 6, 1952, petitioner attempted to appeal from the award of the sheriff's commissioners directly to the Federal Court by serving a "Notice of Appeal from Assessment of Damages" upon respondents (R. 4), and docketing a complaint in the United States District Court (R. 4), and causing an ordinary summons to be issued and served upon the landowners (R. 9).

Thereafter and on March 11, 1952, the petitioner served a Notice of Appeal to the appropriate State Court from the **same award** by the sheriff's commissioners (R. 47), and filed a petition of removal to the United States District Court (R. 48).

The United States District Court for the Southern District of Iowa, Western Division, sustained respondents' motion to dismiss the complaint and overruled respondents' motion to remand the removal case (R. 37-39; 107 F. Supp. 895).

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the attempted direct appeal to the United States District Court and reversed the United States District Court's decision overruling the motion to remand, with directions to grant the motion and remand the cause (R. 87, 88; 204 Fed. 2d 116).

The Court of Appeals held that no right of appeal from the commissioners' award to the United States District Court is provided for in either the State Code or Rule 71A of the Federal Rules of Civil Procedure, and that the right of petitioner to initiate the proceedings

in the United States District Court was not before the court "for the simple reason that it did not do so * * *" (R. 86, 204 Fed. 122). As respects the removal, the Court of Appeals held that the decision of this court in *Mason City and Fort Dodge R. Co. v. Boynton*, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, was controlling since that decision involved the right of removal by parties to a condemnation proceeding commenced under the procedural law of the State of Iowa. The Boynton case, supra, held that in an Iowa condemnation case the landowner is the defendant for purposes of removal. Therefore, the Court of Appeals held that the Motion to Remand should have been sustained.

Thereafter petitioner filed a petition for rehearing with the Court of Appeals (R. 89-100) which was denied (R. 100-108; 204 F. 2d 954).

In the opinion of the Court of Appeals denying the petition for rehearing the court emphasizes that petitioner strictly followed the Iowa procedure for initiating the condemnation suit in the Iowa State courts and that no complaint was filed in the United States District Court until after an appeal was taken from the commissioners' award as required by the Iowa Procedural Statute. The court further held that petitioner did not attempt to invoke the original jurisdiction of the Federal Court under Rule 71A of the Federal Rules of Civil Procedure (R. 101-107, incl.; 204 F. 2d 954).

SUMMARY OF ARGUMENT

I.

After obtaining the substantive right to condemn, petitioner had the choice of commencing the action in the state or federal courts. Petitioner followed state procedure until a final award was entered and then attempted to appeal directly to the Federal Court. Since petitioner failed to commence the action in Federal Court, the petitioner has not been denied access to the federal courts.

Franzen v. Chicago, Milwaukee & St. Paul Ry. Co., 7 Cir., 278 Fed. 370.

Central Neb. Public Power & Irr. Dist. v. Harrison, 8 Cir., 127 F. 2d 588.

United States v. Dillman, 5 Cir., 146 F. 2d 572.

United States v. Federal Land Bank of St. Paul, 8 Cir., 127 F. 2d 505.

United States v. 16,574 acres of land (D. C. S. D., Texas), 49 F. Supp. 555.

United States v. 18,236 acres of land in Franklin County, Pennsylvania, 6 F. Supp. 665.

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United States v. 250 acres of land in Nueces County, Texas, 43 F. Supp. 937.

United States v. 266.25 acres of land in Charleston County, South Carolina, 43 F. Supp. 633.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A., pocket part.

Notes of the Advisory Committee to Rule 71A, Federal Rules of Civil Procedure.

II.

The decision of the court below is in harmony with decisions of this court and the decisions in other circuits. Other circuits have uniformly held that under the decisions of this court a condemnation proceeding is a civil action which may be commenced under the diversity jurisdiction of the federal courts. Federal courts have also uniformly appointed commissioners or viewers provided under state procedures. The United States District Courts have no appellate jurisdiction from state proceedings.

Norton v. Larney, 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145.

Young v. Main, 8 Cir., 72 F. 2d 640.

Ward v. Morrow, 8 Cir., 15 F. Supp 2d 660.

McNutt v. McHenry Chevrolet Co., 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780.

Franzen v. Chicago, Milwaukee & St. Paul Ry. Co., 7 Cir., 278 Fed. 370.

Williams Livestock Company v. Delaware L. & W. R. Co., (D. C. Pa.), 285 Fed. 795.

Burford v. Sun Oil Co., et al, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424.

III.

Petitioner did not commence its action in the federal courts following the simple procedure of Rule 71A. In-

stead petitioner followed state procedure until becoming dissatisfied with the award, and then attempted a direct review of the award in the Federal Court. This unusual and unprecedented procedure attempted by the petitioner because of its own delay does not give rise to any question of general interest.

54 Am. Jur. 874, Sec. 236.

National Labor Relations Board v. Pittsburgh SS Company, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453.

IV.

This Court previously held in the case of *Mason City and Ft. Dodge Ry. Co. v. Boynton*, 197, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, that under an Iowa condemnation proceeding the landowner is the defendant and the party entitled to remove under the removal statute. This case has been uniformly approved and followed and no reason is given for its reversal. Hence petitioner was not entitled to remove.

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868.

Kloeb v. Armour & Company, 311 U. S. 199, 85 L Ed. 124, 61 S. Ct. 213.

Mason City and Ft. Dodge Railroad Company v. Boynton, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

28 U. S. C. A., Sec. 1441 (a).

ARGUMENT

I.

Petitioner has not been denied access to the federal courts since petitioner failed to commence the action initially in the federal court, but sought to appeal from a final award under state procedure.

The principal contention of petitioner is that by the decisions below it has been denied access to the United States courts in proceedings properly cognizable therein. Respondents insist that petitioner itself failed to invoke the jurisdiction of the United States courts. It is respondents' position that there is no appeal to United States courts from state rulings, either administrative or judicial; that while initially petitioner could choose its forum it could not cut across from state to federal jurisdiction after the sheriff's commissioners made their awards and petitioner deposited the amounts thereof with the sheriff; and that petitioner, being the plaintiff and not the defendant in the state proceedings it instituted, could not remove those proceedings to the United States courts.

The petitioner herein commenced these condemnation proceedings under Iowa procedural laws. Apparently being dissatisfied with the award of the sheriff's commissioners, which under Iowa procedure is a final award unless appealed from, petitioner attempted by two different methods to obtain a review of the award in the federal courts. The petitioner attempted first to appeal directly to the United States District Court and then attempted to appeal to the State Court and remove the action. Respondents respectfully submit that petitioner can-

not appeal from the commissioners' award directly to the Federal Court; and that if it had desired to bring the action before the federal courts, it should have commenced the action intially in the United States District Court following the procedure in the federal courts set forth in Rule 71A of the Federal Rules of Civil Procedure, 28 U. S. C. A.

The petitioner contends that under Iowa procedure the proceedings before the sheriff are purely administrative and under Iowa procedure there is no "civil action" until an appeal is taken from the award to the state court. If by this the petitioner means that there is no "civil action" pending in the state court prior to the award, respondents do not dispute the contention. **But Iowa procedure cannot affect the method of commencing an action in the federal courts.** In fact, petitioner itself argues in Division II B of its brief that the Iowa legislature could not by procedural laws affect the jurisdiction of the federal courts. Yet petitioner now claims that in order to proceed in federal court it was first necessary to follow the Iowa procedure until a final award was entered by the sheriff's commissioners and then to appeal to the federal court.

The petitioner's contention that it has been denied access to the federal courts in the instant proceedings is grounded on the false postulate that it had no cause of action in the United States Court until after it exhausted the administrative remedies provided by the state procedural statutes. In this, petitioner is clearly in error. In our Statement of the Case we have set out the pertinent portions of the applicable Iowa statutes. It will be noted that Chapter 471 of the Iowa Code of 1950, re-

lates to the power to condemn and prescribes all the conditions precedent to that right. The right is extended to the State of Iowa by § 471.1, to the United States Government by § 471.2, to other entities by § 471.4 and to railroads by § 471.6, et seq. Under § 471.10, a railroad, before instituting condemnation proceedings under § 471.9, shall apply in writing to the Iowa State Commerce Commission for permission to condemn. The Commission must give notice to the landowner and examine into the matter and report by certificate to the Clerk of the District Court in the county in which the land is situated, the amount and description of the additional land necessary for railroad use. The statute then provides:

> "whereupon the company shall have the power to condemn the lands so certified by the Commission."

We respectfully submit that the petitioner having satisfied that requirement, and having received the authority of the Iowa State Commerce Commission to condemn, could immediately institute the proceeding either under state or federal procedure. But petitioner could not start under state practice before the sheriff and then cut across to the federal court by way of an appeal from the award of the sheriff's commissioners. The power to condemn became absolute when petitioner received the approval of the Iowa State Commerce Commission. There is no requirement, as a condition to the right to condemn under Iowa law, that the condemnor proceed before the sheriff as set forth in the procedural chapter of the Iowa Code. It was perfectly proper for petitioner to file the proceeding before the sheriff, but that was not a federal court condemnation proceeding; it was a state proceeding and that is all.

We respectfully submit that the petitioner is in error in contending that it necessarily instituted the proceedings in the sheriff's office. When those proceedings were instituted, petitioner had the absolute right to condemn —a substantive right granted by the State of Iowa. But that substantive right was enforceable either in federal court or in state court. If the petitioner desired to proceed in the federal court, it might have done so at the very moment that it received the sanction of the Interstate Commerce Commission and the State Commerce Commission of Iowa. There was no other condition attached to the power to condemn. Proceedings before the sheriff's commissioners are merely the first step in a state condemnation proceeding.

There is no authority in either state or federal law for the hybrid proceeding attempted by petitioner in this case, part state and part federal in nature.

Rule 71A of the Federal Rules of Civil Procedure was adopted in 1951 to govern exclusively the procedure in the federal courts for condemnation of real property under the power of eminent domain.

Petitioner did not follow the procedure set forth in Rule 71A, and we respectfully submit that the obvious and only method of invoking federal court jurisdiction of condemnation proceedings is to commence the action in the federal court as provided in Rule 71A. Subdivision (k) of Rule 71A specifically relates to condemnation under state substantive law, as follows:

> *(k) Condemnation under a State's Power of Eminent Domain.* The practice as herein prescribed governs in actions involving the exercise of the power

of eminent domain under the law of a state, provided that if the state law makes provisions for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

Thus 71A (k) provides that condemnation proceedings under state substantive law, if brought in federal court, are governed by Rule 71A, and in such a case if the state law makes provision for trial of any issue by jury, or trial of the issue of compensation by jury or commission or both, that provision shall be followed in the proceeding brought in the United States Court.

Even prior to Rule 71A the federal courts under the conformity statutes followed as closely as possible in federal court state rules respecting commissioners by appointing such commissioners in diversity condemnation cases. *Frasses v. Chicago, Milwaukee & St. Paul Ry. Co.*, 7 Cir., 278 Fed. 370. And in condemnation cases involving the United States as plaintiff the district courts under the conformity acts either appointed commissioners itself or ordered the United States marshal to do so. See

Central Neb. Public Power & Irr. Dist. v. Harrison, 8 Cir., 127 F. 2d 588.

United States v. Dillman, 5 Cir., 146 F. 2d 572.

United States v. Federal Land Bank of St. Paul, 8 Cir., 127 F. 2d 505.

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United States v. 250 acres of land in Nueces County, Texas, 43 F. Supp. 937.

United States v. 266.25 acres of land in Charleston County, South Carolina, 43 F. Supp. 633.

Petitioner neither contends nor cites authority to the effect that the federal court could not have appointed commissioners. Furthermore, Rule 71A (k) specifically provides for following state law as to appointment of commissioners. If they would be appointed in a state proceeding, they would likewise be appointed in federal proceedings. But in such a case they would be appointed by the federal courts and under federal supervision.

The proper method for petitioner to have followed to commence the action in federal court would have been the simple procedure set forth in Rule 71A; that of instituting the proceeding in the United States District Court and requesting that commissioners be appointed by the United States court, or by the United States marshal under order of the court. If the award should prove unsatisfactory the case would then be heard before a federal court jury. Instead, petitioner followed state procedure to the point where a final award was made from which petitioner could, under state procedural statutes, appeal to the state courts, but certainly could not appeal to the federal courts.

Under petitioner's theory the procedure in federal courts would vary from state to state depending upon the procedure in each state. As heretofore pointed out, state

procedure cannot affect the procedure in the federal courts. The fact that under state practice a matter is first decided in an administrative proceeding and no "civil action" is pending in the state court until an appeal is taken to that court, does not mean that that same substantive right cannot be determined in the federal court by filing a civil action therein. And in the United States Court federal not state procedure controls. Furthermore the principal reason for the adoption of Rule 71A was to establish uniformity in procedure in federal courts in condemnation cases. The following excerpts from the Notes of the Advisory Committee on the Federal Rules regarding Rule 71A show that the purpose of the rule was to develop a uniform procedure to replace the previous practice under the conformity system which the committee described as "atrocious":

> "The Advisory Committee have given more time to this rule, including time required for conferences with the Department of Justice to hear statements of its representatives, than has been required by any other rule. The rule may not be perfect but if faults develop in practice they may be promptly cured. Certainly the present conformity system is atrocious." 28 U. S. C. A. following Rule 71 A, pocket part, page 98.

> "Rule 71 A affords a uniform procedure for all cases of condemnation invoking the national power of eminent domain, and, to the extent stated in subdivision (k), for cases invoking a state's power of eminent domain; and supplants all statutes prescribing a different procedure." 28 U. S. C. A. following Rule 71 A, pocket part, pages 102, 103.

> "*Note to Subdivision (h).* This subdivision prescribes the method for determining the issue of just

compensation in cases involving the federal power of eminent domain. The method of jury trial provided by subdivision (h) will normally apply in cases involving the state power by virtue of subdivision (k)." 28 U. S. C. A. following Rule 71 A, pocket part, page 104.

"*Note to Subdivision (k).* While the overwhelming number of cases that will be brought in the federal courts under this rule will be actions involving the federal power of eminent domain, a small percentage of cases may be instituted in the federal court or removed thereto on the basis of diversity or alienage which will involve the power of eminent domain under the law of a state. See Boom Co. v. Patterson, 1878, 98 U. S. 403, 25 L. Ed. 206; Searl v. School District No. 2, 1888, 8 S. Ct. 460, 124 U. S. 197, 31 L. Ed. 415; Madisonville Traction Co. v. Saint Bernard Mining Co., 1905, 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462. In the Madisonville case, and in cases cited therein, it has been held that condemnation actions brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the federal court. See, also, Franzen v. Chicago, M. & St. P. Ry. Co., C. C. A. 7th, 1921, 278 F. 370, 372.

"Any condition affecting the substantial right of a litigant attached by state law is to be observed and enforced, such as making a deposit in court where the power of eminent domain is conditioned upon so doing. (See also subdivision (j)). Subject to this quelification, subdivision (k) provides that in cases involving the state power of eminent domain, the practice prescribed by other subdivisions of Rule 71 A shall govern." 28 U. S. C. A. following Rule 71 A, pocket part, page 105.

The rulings of the Court of Appeals do not deprive a non-resident condemnor of access to the federal courts.

The petitioner simply did not invoke the jurisdiction of such courts. It followed state procedure and subsequently sought to bring the action before the federal court by way of appeal. The effect of the procedure adopted by the petitioner would result in a system more "atrocious" than the previous conformity system and would completely ignore the procedure set forth in Rule 71A. Petitioner failed to follow the mandate of Rule 71A as to the contents of the complaint, the notice given or the heading of the complaint.

Furthermore, the deposit of the award made by petitioner as required by Iowa practice in order to obtain possession of the land is being held by the Iowa sheriff who is neither **an officer of the Federal Court nor a party to the action.** Both the Court of Appeals and the District Court held that the petitioner failed to commence the acion in the Federal Court as provided by Rule 71A and that the United States District Court has no jurisdiction of an attempted appeal from a final award under state procedure. The opinion of the District Court in the decision below points out:

> "The effect of the rule (Rule 71A) therefore, as I interpret it, is to provide for a condemnor undertaking to exercise the power of eminent domain under the law of a state, the means to proceed in this court in the first instance if jurisdiction resides here under Sec. 1332, Tit. 28, U. S. C. To hold otherwise would have the effect of depriving a citizen of another state of rights conferred upon him by Sec. 1332 to commence an action here. It would be equivalent to amending Sec. 1332 by inserting what we have italized so that it would read thus: 'The district courts shall have original jurisdiction of all civil suits *except those involving the exercise of the power of*

eminent domain where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between: (1) Citizens of different states.'

* * * * *

"One having the right to come here initially in condemnation proceedings surely cannot go partly down the road of the state procedure and then cut across from the sheriff's commissioners' award to this court. There is no such path defined. It was said earlier in Division I that there is no authority for such action. It is perhaps better said that Rule 71A is authority *against* such action. * * *" (R. 34, 35; 107 F. Supp. 905.)

The Court of Appeals for the Eighth Circuit in its decision answered petitioner's contention as follows:

"The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioners' award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71A confers none. No such right exists.

* * * * *

"The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject." (R. 82, 86; 204 Fed. 120, 122.)

The majority opinion of the Court of Appeals denying the petition for rehearing also made clear the fact that petitioner did not attempt to commence the action initially in the federal court. The court states:

"The complaint filed in the United States District Court cannot be treated as having created an original action in the federal court. It is correct, as the Rock Island contends, that the Iowa legislature could not restrict or enlarge the jurisdiction of the federal court by procedural statutes, and we must not be understood to have so held. It may well be that if this action had been commenced in the United States District Court that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages. It might also be that if the action had been initiated in the federal court that that court would have followed the Iowa procedure under Rule 71A. But it was not asked to do so And we do not pass upon that question because it, like the question of whether the action could have been initiated in the federal court, is not in the case." (R. 102, 103; 204 F. 2d 954, 955.)

Petitioner herein did not attempt to commence the action in the Federal Court, but waited until a final award was made under state procedure, then attempted to invoke the jurisdiction of the Federal Court by way of appeal. If the procedure attempted to be followed by petitioner herein were held to invoke federal jurisdiction, we respectfully suggest that Rule 71A is less than useless. Furthermore, if the procedure followed by petitioner was right, the procedure followed in innumerable cases, such as those cited on pages 14, 15, supra, was improper.

The power to condemn was unconditionally granted to petitioner at the moment it received the authorization of the Iowa State Commerce Commission. That power was not further conditioned on bringing proceeding before the sheriff. Having the power to condemn, petitioner had a

choice of forum—state or federal. That it chose state procedure to enforce its substantive right of condemnation was not the fault of respondents. Petitioner has not been denied access to the federal courts. It has merely failed to invoke that jurisdiction.

II.

The decision of the court below is in harmony with decisions of this court and the decisions in other circuits.

After the petitioner attempted a direct appeal from the award of the sheriff's commissioners to the United States District Court the landowners filed a Motion to Dismiss the cause of action on the ground that the District Court was without jurisdiction. Of course, the petitioner had the burden of showing the jurisdiction of the federal court. See *Norton v. Larney*, 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145; *Young v. Main*, 8 Cir., 72 F. 2d 640; *Ward v. Morrow*, 8 Cir., 15 F. 2d 660; *McNutt v. McHenry Chevrolet Co.*, 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780. However, the petitioner cited no cases showing any appellate jurisdiction in the United States District Court to consider such an appeal and cited no case involving any similar situation.

The ultimate question is whether petitioner, after having obtained the substantive right to condemn, could follow state procedure until after an award was entered and then appeal directly to the federal court. Assuming that the federal court has jurisdiction of condemnation cases, there is also the incidental question of how a condemnation action should be commenced in the United States District Courts in Iowa.

First of all, petitioner contends that it was required to follow the state procedure until after an award was entered. No authorities are cited for this proposition and, in fact, in Division II-B of its brief, petitioner argues that jurisdiction of a federal court "cannot be restricted, enlarged or diminished by reason of state procedural statutes." Yet petitioner now contends that the state procedure for an award by a sheriff's commission must be followed before a federal court would have jurisdiction.

As heretofore pointed out, the petitioner had the substantive right to condemn after being authorized by the State Commerce Commission of Iowa. We have also shown that there was no attempt made by the State Legislature to restrict or limit the exercise of this substantive right to state courts or proceedings. As we have pointed out, petitioner itself argues that the state could not restrict the substantive right, yet that is exactly what petitioner contends in other portions of its brief.

The petitioner has cited no cases holding that after obtaining the substantive right to condemn property a district court would not have initial jurisdiction of the action. That a condemnation proceeding is a civil action within the jurisdiction of the federal courts is settled in the case of *Franzen v. Chicago, Milwaukee & St. Paul Ry. Co.*, 7 Cir., 278 Fed. 370. This case affirmatively shows that even before Rule 71A of the Federal Rules of Civil Procedure the federal courts had jurisdiction in diversity condemnation cases. In that case it was held that a condemnation proceeding authorized by the law of Illinois could be instituted in the federal court, as against the

contention that the state court alone was authorized by the Illinois statute to try the issues arising out of the condemnation proceeding considered. The court stated in the course of its opinion, l. c. 278 F. 371:

> "But defendants contend that the federal court cannot maintain an action to condemn; the state court alone being authorized by the Illinois statute to try issues arising out of such proceedings. A very interesting and, we may add, able brief is submitted in support of this contention. But the question is closed by the decisions of the Supreme Court. Miss., etc., River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Searl v. School Dist., 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Mason City & Ft. Dodge Ry. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629; Kohl v. United States, 91 U. S. 367, 23 L Ed. 449.
>
> "10 Ruling Case Law, 207, we think, correctly announces the law of these decisions to be:
>
> > "'A judicial proceeding to take land by eminent domain and ascertain compensation therefor is a suit at common law within the meaning of the federal Judiciary Act; and when the requisite diversity of citizenship exists such a suit may be brought in or transferred to the federal District Court of the district in which the land lies.'
>
> "See, also, Nichols on Law of Eminent Domain (1917 Ed.), pp. 1040, 1041."

Furthermore, we have heretofore cited cases showing that the federal courts can appoint commissioners provided by state laws and the petitioner has cited no cases showing that a federal court could not appoint

commissioners. The commissioners provided by state law were appointed by the federal court in the *Franzen* case, supra, and viewers under state procedure were also appointed by the Federal Court in *Williams Livestock Company v. Delaware L. & W. R. Co.*, (D. C. Pa.) 285 Fed. 795. Under the Pennsylvania statute there involved, the right to condemn arose after depositing a bond (in this case the right arose upon securing permission of the Iowa State Commerce Commission under Code Iowa, 1950. § 471.10). In the Pennsylvania case the first step in condemnation was appointment of viewers (here it is appointment of commissioners). In the *Williams Livestock Co.* case it was held by the United States District Court for the Middle District of Pennsylvania that the provisions of the Pennsylvania Statute requiring the viewers appointed to assess damages for land condemned, on a petition filed in a court "of this Commonwealth" to be chosen from a board selected by the Court of Common Pleas of the county, and that they shall meet at the place designated by such court, and be governed by its rules and orders and report to it, **were not applicable when the petition was filed in the federal court** which was required to conform to the state court practice as near as might be. The court held that the viewers would be appointed by the court and that the court would not make its selection of viewers from the county board appointed by the judge of the Court of Common Pleas of the county. The court said that the state statute did not attempt to limit the action of the federal court and that if it did so, the selection and appointment of the viewers would be that of the state and not of the federal court.

The *Williams and Franzen* cases further show that federal courts may take jurisdiction in condemnation proceedings even though they do not exactly follow the state procedure. In the *Williams* case the manner of the selection of the viewers under state law was not followed to the letter and in the *Franzen* case the state provisions for selecting jurors from freeholders of a certain county were not followed.

However, the important point of these cases is that the state procedural matters do not affect the jurisdiction of the federal courts. We have also heretofore cited many cases involving condemnations in the federal courts under federal statutes involving the United States in which the federal courts under the Conformity Acts appointed commissioners provided under state procedure.

The case of *Burford v. Sun Oil Co., et al*, 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424, cited by petitioner, involved entirely different principles which are not applicable here. In that case an action was commenced in equity in the federal court to set aside an order of a Texas commission granting a permit to drill oil wells. A comparable situation in this case would have been presented if an equitable action had been commenced to set aside the order of the Iowa State Commerce Commission authorizing petitioner to condemn the lands here involved. The case involved herein is an appeal from an award and does not attempt to set aside the award. This distinction is set forth in the *Burford case* as follows:

> "There is some argument that the action is an 'appeal' from the State Commission to the federal court since an appeal to a State Court can be taken

under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order." (63 S. Ct. at page 1099.)

Thus in the *Burford case*, supra, the action was commenced in equity to set aside an order of the State Commission on the ground that the order was a denial of due process of law. The instant case involves merely a review of the amount of the award by the sheriff's commission and is in no sense a separate cause of action to set aside an order but is merely a direct appeal seeking a review of the order.

Therefore, it appears that after the petitioner obtained the substantive right to condemn, it had the choice of proceeding initially in the state or federal forum as shown by the above authorities and the petitioner cites no authority for an appeal from the state award to the federal court.

III.

No substantial questions of general interest are presented as to the scope and proper application of Rule 71A, Federal Rules of Civil Procedure.

It is manifest under Rule 35 (5) of the rules of the United States Supreme Court that certiorari will be granted only if there are special and important reasons therefor and in cases of gravity and importance. 54 Am. Jur. 874, Sec. 236 (Citing cases.)

As pointed out by this court in *National Labor Relations Board v. Pittsburgh SS Company*, 340 U. S. 498, 95 L. Ed. 479, 71 S. Ct. 453, certiorari is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeals.

No conflict exists in the present instance and Rule 71A of the Federal Rules of Civil Procedure is clear upon its face as to the procedure to be followed by condemnors seeking to invoke the jurisdiction of the federal court.

The procedure to be followed under Rule 71A is clearly delineated. Subdivision (k) of this rule specifically embraces actions arising under and by virtue of the granting of the right to condemn under state statute.

The petitioner did not follow the procedure there prescribed and did not initiate its action in the federal court. Instead petitioner waited until after the final award was entered pursuant to the state procedure and then attempted to invoke the jurisdiction of the federal court by an appeal.

The decision of the lower court merely stated that no such appeal was authorized either by the state code or by Rule 71A. The court did not decide that the petitioner could not initiate its action in the federal court under Rule 71A and did not endeavor to pass upon that question for the reason that it was not before it. 204 F. 2d 116.

The petitioner does not contend that Rule 71A is invalid or that it grants a right of appeal.

It is fundamental, as contended by petitioner, that a state statute cannot invest a federal court with appellate jurisdiction. However, petitioner contends on the one hand that it was bound to follow state procedure initially, and then contends on the other hand that state procedure could not bind it as far as the appeal is concerned. The inconsistency in this argument creates a peculiar paradox, but does not give rise to any substantial question of gravity and importance.

No logical reason is advanced as to why the petitioner should be permitted to follow state procedure, and then if dissatisfied with the award to invoke the jurisdiction of the federal court.

The petitioner had the initial choice of exercising its substantive right to condemn in either the federal or the state forum.

It is admitted by the petitioner that Rule 71A must be followed, but petitioner says t[illegible]fore it can follow the federal procedure it must first follow the state procedure. Such contention is not supported by any citation of authority and no conflict exists. No substantial question of general interest is presented and no special or important reason is advanced as to the necessity of examining the language of Rule 71A which is clear upon its face and which was specifically drafted for the purpose of eliminating conflict or confusion as to the procedure to be followed in federal court in condemnation matters.

IV.

Petitioner is precluded by previous decisions of this court from removing the state court appeal to the federal court.

Following petitioner's attempt to appeal directly from the award of the commissioners to the United States District Court, an appeal from the same award was docketed in the state court by the petitioner who then attempted to remove that action to the United States District Court. It is fundamental that, under the removal statute, 28 U. S. C. A., Sec. 1441 (a), only a defendant is entitled to remove and the only question presented by petitioner is whether or not it was a defendant within the meaning of this statute. No conflict of authority exists on this question and this court has held, without equivocation, that the petitioner is not a defendant.

The Removal Statute is interpreted by the federal courts so as to have a uniform application regardless of local laws or designation of the parties. This principle is amply illustrated in *Shamrock Oil & Gas Corporation v. Sheets*, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, and *Kloeb v. Armour & Company*, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213. In the *Shamrock* case the plaintiff instituted his action in a state court, the amount involved being insufficient to invoke the jurisdiction of the federal court. Thereafter, the defendant filed a counterclaim, and the sum therein prayed for exceeded the requisite amount necessary to invoke the jurisdiction of the federal court. The plaintiff sought to remove the entire cause to the federal court contending that he became a defendant when the counterclaim was filed. In denying this con-

tention, the court, speaking through Mr. Justice Stone, said, at page 104 of 313 U. S.:

> "Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. Peck v. McKellar, 33 Tex. 234; Gimble & Son v. Gomprecht & Co., 89 Tex. 497, 35 S. W. 470; Harris v. Schlinke, 95 Tex. 88, 65 S. W. 172. But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence, the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. Burnett v. Harmel, 287 U. S. 103, 110, 77 L. Ed. 199, 204, 53 S. Ct. 74."

In the case of *Mason City & Ft. Dodge Railroad Company v. Boynton*, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, which is cited as controlling authority in the *Shamrock* case, this court determined the status of the parties under Iowa condemnation laws so far as the removal statute is concerned. In that case a condemnation proceeding under the Iowa statutes was involved. There, the landowner appealed from the commissioner's award and then attempted to remove his cause to the federal court. A question was certified to this court as to whether the landowner was a defendant.

The opinion by Mr. Justice Holmes clearly answers this question in the affirmative and it is stated:

"But this court must construe the act of Congress regarding removal. And it is obvious that the word 'defendant' as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which, for the purposes of removal, this court might think the proper ones to be applied. In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the state decision was wrong. We leave the latter question where we find it. But we are of opinion that the removal in this case was right for reasons which it will not take long to state.

"It is said the proceedings only become a case, within the meaning of the act of Congress, after the preliminary assessment and the appeal, and that then the landowner is in the position of one demanding pay for property which he has lost. If we take a general view of the Iowa statutes, this conclusion is not correct. The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none the less. Whichever party appeals, it is not true that the landowner is seeking pay for what he has lost. By § 2011 the railroad is free to decline to take the property if it thinks the price too large. Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to

suppose that the deposit impairs the railroad's right to withdraw, although the supreme court of Iowa says ubi, supra, that, by payment and entry, the railroad appropriates the land. See § 2013. Probably, too, the position of the parties under the act of Congress should be determined upon general considerations, without regard to what has happened. Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. **The intent of railroad to get the land is the mainspring of the proceedings from beginning to end,** and the persistence of that intent is the condition of their effect. The state is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. **Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will.** Hudson River R. & Terminal Co. v. Day, 54 Fed. 945." (Emphasis ours.)

Here, as in the *Boynton* case, the petitioner has deposited the amount of the award and taken possession of the land. If, as in the *Boynton* case, the landowner is a defendant, for the purpose of removal even when he appeals, it surely cannot be contended that his position becomes that of a plaintiff when the condemnor appeals. This is clearly set forth in the Boynton opinion, wherein it is stated:

"The railroad might have taken the appeal. If it had, the landowner would have been on the defensive in endeavoring at least to uphold the assessment, but he would have been called the plaintiff none

the less. * * * The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end. * * * The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will."

VII.

The *Boynton* case has been uniformly followed in the federal courts and the lower court found that it was bound to apply the rules laid down by this court in the *Boynton* and *Shamrock* cases and therefore held that the petitioner was not entitled to remove.

No conflict exists on this question between the decision of the lower court and the previous decisions of this court and no special or important reason has been advanced by the petitioner for a redetermination of those decisions.

Petitioner, as a condemnor, had the initial choice of instituting the proceedings in the federal court under Rule 71A (k) or of commencing his proceedings in the state court pursuant to the procedural rules laid down by Chapter 472 of the Code of Iowa, 1950. The fact that the petitioner became dissatisfied with the commissioners' award and then sought federal court jurisdiction is not a substantial, grave or important reason for reversing the *Boynton* and *Shamrock* cases so as to allow the petitioner to remove his action.

CONCLUSION

Therefore, petitioner has not been denied access to the federal courts and the removal question has been pre-

viously determined against petitioner by this court. There is no conflict in the decisions and no valid reason is assigned by the petitioner for the granting of the petition for certiorari.

Respectfully submitted,

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